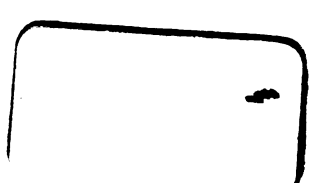
HOW TO PREPARE A CASE FOR TRIAL

LONGENECKER



HOW TO PREPARE A CASE FOR TRIAL

A BRIEF TREATISE

ARRANGED ON AN ELEMENTARY PLAN
TO ASSIST THE NOVICE IN THE
PREPARATION OF THE MOST
DIFFICULT LAWSUIT
FOR TRIAL

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To the memory of
my father
JOEL M. LONGENECKER
who taught me to think, seek and act for
myself

PREFACE

HOW TO PREPARE A CASE FOR TRIAL

The young lawyer just admitted to the bar, who starts out to practice alone, is confronted with a gigantic task. He is frequently called upon to give advice upon a state of facts new to him, and to answer questions indiscriminately and quickly; or he is asked if it is advisable to adjust a claim rather than be put to the expense and inconvenience of attendance in court.

Then again, he is confronted for the first time with this situation, he has been unable to adjust a claim, suit has been brought and he must prepare his case for trial.

Look where he will he cannot find an elementary work or treatise on how to collect and arrange material to prepare his case and present it, which is brief, simple and practical.

It is not always the recently admitted practitioner who is bewildered when it comes to preparing and trying a case. In fact it has been noticed and remarked that only a small number of the cases tried, are carefully and methodically prepared, with the exception possibly of those of large corporations.

Whether it is because many lawyers have not been trained to be systematic or whether it is due to their ignorance, or lack of practice, time, or what, it is a lamentable fact that the judges become exasperated at the lawyers who appear before them unable to properly present or defend their client's cause.

Oftentimes a lawsuit is lost and legal rights are defeated for the reason that it has not been properly prepared or presented, or the successful lawyer has studied both sides of the case and is better equipped and therefore more skillful in the trial. Frequently the judge is compelled, through compassion for the client, to take a hand in the case in order to bring out the facts, that justice may be done.

It is by reason of this situation that a

simple and concise system of preparing cases should be brought to the attention of those who desire to improve their present method of preparing and presenting cases, and that we may have a better administration of justice, that this is written.

ROLLA R. LONGENECKER.

September, 1916.

PREPARATION OF A TRIAL BOOK

A uniform and practical system of arranging matter to be used in the trial of a case is indispensable if one wishes to properly prepare and present it and avoid confusion during the trial.

Procure a blank book with sheets about 8½x11 inches. A book is to be preferred to a block of paper, because of its more permanent nature. A loose leaf book is ideal, by reason of the fact that a leaf may be inserted quickly and with ease at the proper place following its subject head, and after the case has been tried, the sheets may be removed, fastened and put away as a record with the files for future reference.

Make an Index of Subjects as Follows

Use a separate sheet or page for each of the above subject heads. If desired, each subject may be divided and sub-divided or the subjects may be combined to suit one's taste.

This index will serve to guide you in sorting, classifying and recording material under its appropriate head, as well as furnish an outline of the method to pursue in gathering all necessary data for trial.

During the trial you can easily find what is wanted, and trace it to the precise witness or document.

Loose papers and letters that may be used during the trial should each have a distinguishing mark and placed flat in large numbered envelopes or folders. On the outside of each folder or envelope make a list of the contents and place after each item its number or identification mark. Each paper in addition to its individual mark should have upon it the number of the envelope in which it belongs. Should you expect to introduce any of the papers or documents in evidence, you must not place marks on them, but attach a small piece of paper in the upper left hand corner

and on that place the envelope number and its distinguishing mark, or "identification mark." A paper or letter should always be placed inside its folder or envelope in the same order as it is listed on the outside.

There is nothing so discouraging during the trial of a case as to search for a paper and not find it. It humiliates the one making the search and causes the jury and judge to become bored and impatient with such methods.

When you have prepared your case and have arranged the pages of your trial book in order, each page should be numbered consecutively and your index completed by placing the page number opposite each subject for future reference.

GETTING THE FACTS

The first thing to do when a case is to be tried (in fact even though it is a claim this should be done, because you cannot tell when a claim will develop into a lawsuit) is to interview all persons who may assist you to learn all the facts, and by putting the results of the investigation together form a connected story of the claim or defense.

Secure the statements of witnesses at the earliest possible moment, reduce to writing and obtain their signature, if possible. Having once signed a statement a witness will rarely change his story because he remembers that such statement was made at a time when the facts were fresh in his mind. You wish to learn the truth and therefore examine witnesses away from the others and reduce the examination to writing. Select the best witnesses in appearance as well as the most intelligent.

If you wish to be eminently successful as a trial lawyer do not leave the examination

of your client or witnesses to subordinates and rely on them to thoroughly cover the ground. It may be expedient or imperative to have an assistant do much of the preliminary work, such as preparing an abstract of statements of witnesses, the facts and the law, nevertheless it would be prudent on the part of the trial lawyer to examine and confirm such material by means of a personal examination and study.

Do not forget to exercise patience with your client and his witnesses.

In gathering the facts it is not only necessary to interview all witnesses and cross examine your client, but frequently it is essential to inspect documents, papers and records, such as bonds, certificates, receipts, notes, court orders, minute books, or other writings, and numerous other objects or articles.

After the facts have been obtained you should arrange them under this title of your trial book, in simple, systematic intelligent and chronological order, preferably in short and distinctive paragraphs, underscoring those facts which are the most im-

portant, that you may easily find them in the excitement of the trial.

In a suit where the facts extend over a considerable length of time, say twelve or twenty-four months, in which facts must be detailed and fixed in certain months, it will be well to separate the facts into months, using a page of your trial book for each month, and designate each fact with a letter, a figure or symbol which will refer you to an index that will quickly tell where to locate exhibits or whatever is necessary to prove the precise fact.

THEORY UPON WHICH YOU EXPECT TO ESTABLISH OR DEFEND YOUR CASE

After the facts have been obtained outline under this heading the theory upon which you expect to prove your claim or case, or the hypothesis upon which you prosecute or defend the action.

The theory must be a logical one. It must be probable. It must be a clear statement or declaration of what the facts are in the prosecution or defense of the suit and which facts you have presumed to be true for the purpose of having a working plan to enable you to reach the true solution of the facts in dispute. It must be practical and not so complicated that it will seem improbable.

What Is Meant by "Theory of the Case"?

It is the plan or scheme framed to agree with the facts decided upon in the case, designed as a reasonable ex-

planation of them and intended to support the relief asked for.

In deciding upon the form of action, consideration must be had, for:

The remedy sought and its method of enforcement.

The proof required and available.

The provisions of the special statutes such as:

Amendments,

Limitations, etc.

The kind of judgment that will be obtained in the action.

The ease with which a judgment may be enforced, remembering the law of exemptions, together with many other facts.

All this will depend upon the laws of the state in which you practice, whether common law, code or special statutes.

An exhaustive study should be made of your statutes, practice and text books, before a conclusion is reached, and finally recorded under this subject head.

PRELIMINARY PROCEDURE

Under this head note the requisite steps to be taken previous to the day of trial.

In some controversies, prior to bringing suit, it is essential that a demand or a tender, or some other preliminary action should be taken, such as a bona-fide offer to perform a contract, so that the breach of it may not be attributed to your client.

Should this occur in the case you are preparing, detail under this section what course of proceeding is necessary, when it should be done, the person who should perform the act, its purpose, and upon whom such action should be had.

Serve demands and make offers in writing and preserve a duplicate. If you have not secured the written acknowledgment of the person served, immediately after service make proof of service on your duplicate, file it with the other papers to be introduced in evidence, giving it a distinctive mark and its envelope number.

Under the subject-title "Evidence" make an entry of the notice of demand or offer, in the order in which you wish to introduce it, otherwise it might be overlooked during trial.

Again it becomes advisable to have subpoenas issued and served to secure the attendance of witnesses. Indeed it is the better plan to subpoena all witnesses, then should one fail to appear you have fortified yourself against the result of his non-appearance, and will be given time to compel attendance because you have laid the foundation for the court's process.

The fact that a witness has been served with a subpoena creates a better impression on the jury, they feel that such witness is not a partisan and therefore unbiased in his testimony.

Sometimes a notice of motion is to be prepared and served, to put the case at issue—a demurrer or plea to be set down for final determination before the trial, or a petition must be prepared and heard asking leave to examine papers or documents within the exclusive possession of the other side.

In the event that you wish to lay the foundation to introduce secondary evidence of the contents of a letter or document, you must prepare and serve a notice on your opponent or his client, to produce the original at the hearing. The notice must be served a sufficient length of time prior to the trial to permit the original to be found and produced, otherwise you will be denied the right to offer secondary evidence.

Statutory notices are required in some cases to entitle one to sue and obtain redress, such as a notice to a municipality of an injury in the street or on the sidewalk.

Other preliminary proceedings are taking depositions, especially where the testimony might be lost before trial, securing a more specific statement of claim or affidavit of defense, or an order for opponent's client to answer interrogatories.

A common practice with some successful advocates is to have timid clients or witnesses attend court for a number of days that they may become accustomed to the surroundings and when the day of the trial

arrives such shyness will have entirely disappeared.

Many times it is advantageous to make a sketch or diagram of the locality in which certain acts occurred. Again, a model will enable witnesses to explain their testimony so that the court and jury will understand the situation much easier.

A proper foundation must be laid to permit models or maps to be shown to the jury, and before the attempt is made be sure to have the person who made it in court to testify for you as to its accuracy.

All such preliminaries should be entered in order under this heading. Each should be in a distinctive paragraph and in the order in which they should have attention.

Unless some such system is followed one is apt to overlook these very important steps.

These few suggestions are sufficient to call your attention to the value of this subtitle, and will no doubt suggest to your mind other preliminary requirements to take note of.

PLEADINGS

Preparing the Pleadings and Putting the Case at Issue

The theory of the case, the preparation of pleadings, the election of remedies or the defense to be pleaded, and putting the case at issue, are questions which must be determined from a thorough search of the statutes and practice books of the state in which suit is brought, and of the law applicable to it; after you have ascertained the facts.

A Record of Pleadings Filed

Make a list here of the pleadings. Set down each pleading in the order filed in court, the date filed, the title of each pleading, its history, subject, substance and the issue raised by it.

Why a record of pleadings?

Because a question as to time might arise, or the opponent might change

his theory of the case and the pleadings would contradict the new theory.

So you will be well informed to answer any question put to you by the court, or raised by your opponent.

Why the familiarity with pleadings?

That you may determine the evidence offered is competent and in accord with the pleadings and issue.

That you may object to incompetent testimony.

That you may keep to the issue.

That you may insist upon your opponent keeping to the issue.

Divide the pleadings into parts, if practicable. Under each part set forth the proof required to sustain it and designate by whom or by what the averment is to be proved, the issue raised and any admission made by it.

Under this head, during the trial, point out the variance, if any, between the pleadings and the evidence.

Should you represent the plaintiff, and during the trial your witnesses testify differently from their statements made to you

or your client, or should new facts develop, it might become advisable to ask leave to amend, or to file an amended declaration, bill of complaint, or a supplemental bill.

Should you represent the defendant, you may use the memoranda here noted to sustain a motion, at the close of the plaintiff's proofs to take the case from the jury, or to instruct the jury to render a verdict in your favor on the ground of a variance that is fatal.

Remember that the purpose of the pleadings is to narrow the controversy to certain well defined issues, and that the court has the right to state what the issues are. Should facts not be denied by the pleadings, then enter under this division of your trial book such matters as "admitted" and hence not necessary to prove.

Indicate here carefully just what the issues are from your view point, in the same order as the way you will set out the steps to make out a prima facie case, with a mark to refer you to the place where to locate the proof of your contention.

SHORT STATEMENT TO PROSPECTIVE JURORS

Under this division write out a careful, short and concise statement to be made to the jurors who will be accepted or rejected by you. The statement should be sufficiently full to inform the prospective jurors of the nature of the claim, the names of the parties, plaintiff and defendant, and other facts that they may give an intelligent answer to the questions which you will ask that go to their qualifications to serve in the particular trial as jurors without prejudice.

This is neither the proper time nor place to make extended remarks to the court or jury. You must not go into details with this statement to the jurors. Your remarks should relate only to matters in general terms.

EXAMINATION OF PROSPECTIVE JURORS

A few general suggestions with regard to the questions to be asked when impaneling the jury will not be out of place here.

Only necessary questions should be asked a prospective juror.

What are necessary questions?

> Questions in regard to an unbiased mind, open and free to hear and determine the cause to be tried without prejudice.

It is not always advisable to question a juror more than the usual formal questions.

Your opponent may have brought out facts that are valuable for you and that will caution you as to your examination. But use your best judgment and act upon your decision.

Many times lawyers accept the jury without a question and again, they ques-

tion at such length as to annoy the jury and thus injure their case.

Remember that the object of the examination is to secure a fair and impartial jury to try your client's lawsuit.

Do not give offense to any one of the jurors by your form of questions.

Interrogate in such a manner that will gain you the respect and confidence of the jury.

Never question in anger or under stress of excitement.

Remember when examining a juror, he may be popular with the others and if he is handled roughly or humiliated by your questions, he will have his fellow jurors' sympathy and they may take a dislike to you before hearing the case, and thus your client's interests are put in jeopardy. Even though he be excused his influence might be exerted against you through channels you are not aware of.

Be frank in your examination, do not use tricks or cunning methods.

When about to excuse a man, just before a challenge, it is sometimes advisable to so frame your question that it will become

known to the remaining jurors why you challenged him.

When in doubt, challenge a juror, exercising your right of challenge peremptorily.

Before the trial take a page and divide it into parts so there will be sufficient space to write in the usual and customary questions put to prospective jurors, with enough space opposite each question to record the answers during the examination of the jury.

Example:

Examination of a Prospective Juror

Name .....
Residence .....
Occupation .....
Age .....
Employer .....
Business Address .....
Married or Single.....
Acquainted with any of the parties to the suit...
Friendly with any of the lawyers.....
Any prejudice against client.....
Any prejudice against cause.....
Religion .....
Politics .....

Add such questions as pertain particularly to the action touching their qualifications to serve with free and open mind.

Bear in mind that this is your first and last opportunity to study your man, through the medium of interrogatories, answers and expressions from which you are to decide if he would make an acceptable juror to try your client's cause.

OPENING STATEMENT TO THE COURT AND JURY

In the course of preparation for trial use the space under this title to make memoranda of those points that may be of service for your opening statement. On final revision eliminate all unnecessary material and rewrite the statement, using simple language and record it in the order you will state it to the jury.

The opening statement should be told in an interesting manner; it should be the story of the claim; either for the defense or for the plaintiff; it should be brief, giving the history and nature of the controversy, together with the facts which you expect to establish by proof.

State only the facts you expect to prove and only those which will establish your case.

In giving this statement one must not repeat, nor attempt to deliver an oration

nor assert what properly should be left to the argument.

You must not overstate your claim or state what you cannot prove, because this will incline the jurors to discount your statements and may cause them to lose confidence in you.

A great deal depends upon your manner and sincerity, in giving to the jury a concise statement of what you expect to prove.

Jurors are very critical and will hold you strictly to what has been stated you expect to prove.

The opening statement is the first opportunity that the jurors selected have for closely observing you. You are making the first impression which is often an important one; they are all attention to hear what you have to say, and from the impression made during the opening statement much depends upon your success; this does not mean that one must go into great detail in the opening statement as this would tend to confuse and tire the jury.

Remember that you wish to implant in the minds of the jury a favorable opinion

of your claim and the further fact that your case is a just one.

It is well in preparing the opening statement of the case to the court and jury to have it unfold in chronological order and a methodical manner.

In the opening statement there should be no display of oratory, it should be plain, straight forward and not "flowèry." You must not treat the jurymen as strangers after starting on the trial of a case, neither should you treat them with too much familiarity.

WHAT CONSTITUTES A PRIMA FACIE CASE

Under this topic set out in separate and distinct paragraphs each element of proof required to make a prima facie case.

If you are representing the plaintiff, arrange it in consecutive and logical order with its key number or index, that you may see at a glance where to find your material and each step required to be taken; the order necessary for each element of proof to be presented to prove your case, and after it is thus set down proceed in the order here outlined.

If you are defending, it is well to make this memorandum to familiarize yourself with your opponent's case and the necessary elements of proof. You will thus be prepared (should occasion arise) to urge a motion to dismiss the suit, or to instruct the jury in behalf of your client, when an element necessary to make a prima facie case is omitted.

ORDER OF PROOF

At this point in your trial book set out systematically and consecutively the order in which you wish to introduce proof. This should be determined beforehand, and you should not swerve from this fixed order after you have once determined it, because it may lead to confusion.

Each element of proof should have a memorandum of that which proves it—either by judicial notice, admission, document, or witness, and a reference to the page in your trial book where the fact or record of it may be found.

EVIDENCE

Here set out items in separate paragraphs that will establish each element of proof essential in your case with its individual mark to call your attention to the method of proof, whether or not you intend to prove the particular piece of evidence by a witness, a paper, a document or what.

Make an abstract and index of your evidence. Sometimes admissions are found in written papers, notices, pleadings, and demands. Make a careful study of them and should such admissions be found, arrange them under this head, as well as other admissions that are valuable to your case, including admissions of opposing counsel and any party to the suit.

WITNESSES

Under this head the name of each witness in the order in which he is to be called to the stand should be entered.

Under the name of a witness each item of proof which you intend to bring out by such witness should be specified in the order that you expect to interrogate him or her.

Frequently it is a good plan to outline under the name of a witness a line of questions that will lead up to a desired climax. By adroit questions to be put on cross-examination you can often discover a prejudiced witness, or "show up" one who is lying.

Witnesses, like other persons, are fond of courteous treatment and it is well to pay attention to them before as well as after the trial. A successful lawyer need not be told that such practice adds to one's standing and makes impressions that bring results which could not be obtained by any other method.

Where there are a great many witnesses to be called by you, it is well to place immediately under this heading an alphabetical index of the names of the witnesses, with page numbers to indicate where the abstract of their expected testimony may be found.

OPPONENT'S CASE

The theory of opponent's case should here be written out with sufficient space between paragraphs or the lines so that you may correct your theory of his case, if required, during his opening statement, or as the trial proceeds.

This is done that you may prepare to meet his case and secure rebuttal evidence or overcome evidence that is against your client—in other words, be prepared to meet all propositions that he may urge.

REBUTTAL

Under this subject title while the trial is progressing set down the opponent's evidence that should be contradicted, the proof required and other necessary memoranda.

LAW

All propositions of law which deal with the particular lawsuit should be placed under this head. When citations are noted, the title of the cause, the number of the report and the page, should be recorded under each statement of law.

This page should be used during the preparation of your case, rewritten in systematic manner prior to the trial and also used during the trial for additional memoranda.

Classify all points to conform to your system and order of proof previously adopted and according to the elements of proof outlined by you under the subject of "What Constitutes a Prima Facie Case."

Acquaint yourself with the statute pertaining to the suit, if there is one, then study the text books on the questions involved, and if possible read special articles (usually found in law libraries in the cur-

rent law magazines) consult encyclopedias, and peruse the reported cases that apply, and you will be thoroughly familiar with the legal aspects of the case.

INSTRUCTIONS

Under this head, as you proceed to prepare your case, write out the probable instructions.

Many times the first rough draft should contain those propositions of law which you may have to look up before you finally decide upon and prepare an instruction founded on the law which you have examined.

Under this head put all of the instructions which you expect to give (or at least a brief statement of the particular matter upon which you expect to have an instruction given to the jury) together with the citation of authority which supports the instruction. The memoranda of the citation is made that you may be prepared to show to the court the authority upon which the instruction is based, should occasion ever arise.

INTERROGATORIES—SPECIAL FINDINGS OR PROPOSITIONS OF FACT AND LAW

Here should be written the interrogatories, if it is decided that special interrogatories should be asked of the jury.

Each interrogatory should be listed in the order in which it is to be presented. The form of the special findings to be submitted to the jury should be written here.

Should it be a trial by the court, without a jury, list the propositions of fact and of law to be submitted to the court for its ruling so that a record can be made of the court's action on each proposition.

ARGUMENT TO COURT OR JURY

In the argument you must put forth your best efforts to picture the case to the court or jury; oftentimes you must analyze all of the testimony, especially where it has been contradictory, and you must endeavor to explain why the testimony seems inconsistent and antagonistic, if it has been conflicting.

Under this head during the preparation of your suit note any point that may be valuable in argument to the jury and before the trial, spend considerable attention to rewriting your argument—it will pay well for the time spent.

During the progress of the trial note those facts that need explanation or which you wish to call the jury's special attention to in your argument.

Should you represent the plaintiff you must not fail to explain to the jury why your client deserves the relief asked and if you are seeking damages explain clearly

why you are entitled to the amount asked and your method of arriving at the figures.

Should you represent the defendant, you ought to be just as careful in arguing to the jury why plaintiff has not made out a case and therefore has no right to redress, and if a sum is asked, show why the manner of computing damage is not correct.

Write these arguments in your trial book as soon as you have decided upon them.

Always use your trial book from the first receipt of a claim that might develop into a lawsuit.

Do not use scraps of paper to write notes or memoranda on with the expectation of rewriting it afterwards, time may not permit the proper classification of such material, or the pieces of paper may become lost or misplaced.

After you have exhausted each subject and arranged it in your trial book you will have all of the elements connected with the cause systematically classified and accessible, and in such usable condition that it

will be an easy task to proceed with the trial. It will be in simple form to present to the court and jury, will show that you are familiar with it and will be as skillfully prepared and presented as could a seasoned lawyer.

After you have learned this method, the work of preparing a case for trial will become simple and less complicated than it now appears.

One serious error, and a common one, is for lawyers to underestimate their antagonist. Prepare your case for trial as though your adversary knew all of the weak points.

Remember that procrastination will undermine and thwart you in the proper and timely preparation of your case. Application to the work of arranging a case for trial will generate a passion for the completion of the task.

Work and vigilance is the tribute that must be paid for a successfully prepared lawsuit for trial and the failure to pay the cost exacts a penalty which we call defeat

and humiliation, eventually leading to the entrance into the class of failures.

Bear in mind that each legal battle increases or decreases your reputation as a lawyer with your clients and friends, in your community and at the bar.

A few lawsuits are won on instructions, many on the argument; others through sympathy for the client because of his incompetent lawyer, or owing to the weakness of witnesses. Some are won on evidence, a few due to the disrespectful treatment of a judge toward the lawyer or party to the action, a portion on the prejudice of a jury against a lawyer or his client; others on quick, snappy work; but by far the most are won because of a thorough and skillful preparation and the studied method with which they are presented.

Interest and enthusiasm kindle a desire for study—study originates system—system develops into habit—habit evolves into efficiency—efficiency, patience and perseverance will create a genius—a successful trial lawyer should be a genius.